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Docket Management System  
U.S. Dept of Transportation  
Room PL-401,  
400 Seventh Street SW  
Washington D.C. 20590-0001

Dear Sir/Madam

**Re: Docket Number FRA 2001-11068, Notice Number 4, RIN 2130-AB39, Federal Railroad Administration, Application of FRA Alcohol and Drug Rules to Foreign Railroad Foreign-Based Employees who Perform Train or Dispatching Service in the United States: Completion of Consultations with Canadian and Mexican Governments and Closure of Comment Period**

**Comments of Canadian National Railway Company ("CN"):**

CN wishes to provide the following comments on the Notice of likely revisions to the NPRM and the request for final comments as published in the July 28, 2003 Federal Register.

Canadian National is North America's fifth largest railroad with 17,600 route miles and 22,000 employees in Canada and the U.S. It operates the largest rail network in Canada and the only transcontinental network in North America. CN has operations in eight Canadian provinces and 14 U.S. states. In 1999 and 2002 CN carried out extremely successful integrations with the Illinois Central and Wisconsin Central Railroads.

**Drug and Alcohol Testing at CN**

Safety is a core value at CN and the railroad has long been recognized as one of the safest in North America. CN believes that an important part of an effective safety program is a drug and alcohol free workplace. As such, the Railroad ensures full compliance with all aspects of FRA requirements under 49 CFR Part 219. As part of the recent IC and WC merger implementation, CN successfully consolidated the drug and alcohol programs for all of its US operations. In addition, Canadian-based train crews that operate into the United States are in full compliance with the current requirements of 49 CFR 219.

Although drug and alcohol testing is not legislated in Canada, CN has been conducting testing under company policies since 1986. In 1997, as part of a major overhaul of its safety programs, CN implemented a comprehensive drug and alcohol policy and program for its Canadian operations. This consolidated a number of existing programs and practices to provide an exhaustive and clearly defined program. CN's new program was accompanied by an extensive training and communications plan and includes testing for:

- Pre-employment for specified risk-sensitive positions (drug only)
- Pre-assignment to a risk sensitive position
- Reasonable Cause
- Return to service/follow-up (post-treatment)
- Post - accident

CN's Canadian drug and alcohol program also provides for employee self referral and co-worker report programs similar to those which would be required under the expanded scope of 49 CFR Part 219 proposed in the NPRM.

As noted in our original submissions, of significance is that the CN policy for Canadian operations does not include random testing. This is entirely due to the Canadian legal climate and specifically the Canadian Human Rights Act, which has in the past ruled that random drug testing is prohibited, even for safety-sensitive positions. Furthermore, random drug testing has been historically prohibited under Canadian railway labour arbitration jurisprudence. Although this may have been somewhat modified by a recent Ontario Court of Appeals decision and Human Rights Commission policy document, it has not been tested in the railway context. For this reason there remains considerable uncertainty regarding the legal status of random drug and even alcohol testing in Canada.

As such, this would be the most significant aspect of the proposed regulation as compared to CN's current practices.

#### **CN Position on Random Testing**

As noted in past correspondence and meetings with FRA, CN supports the concept of random testing for all safety critical employees in its Canadian operations. Unfortunately as referenced above, under current Canadian human rights legislation, it will be difficult and potentially very costly to successfully implement random testing within the boundaries of Canadian human rights legislation unless accompanied by comparable legislation from Transport Canada for similar positions in Canada.

#### **Proposed Likely Changes to NPRM**

In the July 28, 2003 Federal Register Notice, FRA indicates that, based on consideration of issues raised and discussions with the Canadian and Mexican governments, it was planning to make "significant revisions" to the proposed rule.

In reviewing the list of revisions, it is clear that the most significant of the revisions is the addition of an exclusion allowing foreign-based employees of foreign railroads to enter into the US to perform train or dispatching service for a distance of up to 10 route miles

under the present exceptions. FRA suggests that this will have the effect of facilitating interchange with U.S. railroads at the majority of current gateways.

Although CN recognizes the attempt that FRA has made to address issues associated with Canadian operations into the US with the concept of this "border zone", we remain concerned that it does little to address the potential issues associated with CN's operations.

As noted in our comments filed on February 7, 2002 with respect to the original NPRM publication, and revised to incorporate changes since that time, there are currently ten locations where CN Canadian-based trains crews operate into the U.S. These are (with applicable mileage in each direction):

- Border to E. Alburg, Vermont (3.1 miles)
- Border to Rouses Point, NY (1.2 miles)
- Border to Massena, NY (22.3 miles)
- Border to Buffalo, NY (7.6 miles to CSXT Frontier, 12.9 miles to SBRR Seneca, 11 miles to NS Bison)
- Border to Niagara Falls, NY (5.8 miles to CSXT Niagara Yard)
- Border to Port Huron, Michigan and on to Flat Rock, Michigan (1 mile to Port Huron, 77.7 miles to Flat Rock Yard via Port Huron)
- Border to Ranier, Minnesota (1 mile)
- Border to Noyes, Minnesota (1 mile)
- Sprague subdivision (43.8 miles across northern Minnesota from International Boundary to Baudette) - comprising 2 locations where trains enter the U.S

As can be seen, the proposed 10 mile exclusion would only address 5 of these 10 locations. As such, CN would still be left with five locations where the railroad would be required to implement random testing for Canadian-based train crews.

This is of significant concern in that, to comply with this requirement CN will have to create special random testing pools at these five locations. Due to the nature of railway operations, these pools will include many employees who are subject to, but may never actually operate into the US. In managing these pools, CN would be in the extremely difficult position of having to balance the requirements necessary to fully comply with the FRA regulation against the very strict requirements that will be needed to satisfy the Canadian Human Rights Commission.

CN believes that the situation could very conceivably lead to the possibility of Canadian train crews refusing to be tested, thus potentially tying up cross-border traffic and international trade. It is also clear that CN will undoubtedly be forced to incur considerable expense in defending human rights challenges.

In reviewing alternatives, it is important to note that at 4 of the 5 locations, there is not sufficient infrastructure or resources to support alternatives using US-based crews.

It should be noted that these concerns are shared by the Government of Canada. In its submission to FRA of 16 May, 2002, the Embassy of Canada stated the view that Canadian requirements such as the Safety Management System Regulations and the Medical Rule for Safety Critical Positions, as well as Transport Canada's monitoring programs address issues such as those associated with drugs and alcohol and concluded by requesting that the extra-territorial application of the proposed FRA rule be withdrawn.

In reviewing both the concerns raised by FRA in their decision to move ahead with the NPRM and the potential negative effects that such a regulation could have on CN's operations, to accommodate both parties concerns it is suggested that FRA expand the proposed border zone to allow for distances of up to 25 miles into the U.S. It is felt that this will address the majority of CN current operations without adversely affecting the safety of US railroad operations. Clearly the proposed 10 mile limit was not based on any particular science or risk assessment and an expansion to 25 miles to accommodate the majority of existing assignments would not seem to be unreasonable.

Furthermore to address the remaining two CN operations it is recommended that FRA consider the following additions to the final rule:

- a) allowing a grandfathering of existing operations into the US; and
- b) Adding an exclusion for "bridge" operations such as that on the Sprague subdivision where the same foreign crew runs through a small section of the US while operating to and from a foreign country. (Such an exclusion was, in fact, contemplated by FRA in their original NPRM for foreign-based dispatching before the decision was made to allow for specific waivers to address existing operations).

In support of this proposal, CN notes that, FRA has taken a similar approach in addressing the issues associated with the dispatching of US track from a foreign country. In its Final Rule of 10 December, 2002, FRA acknowledges that random D&A testing would be extremely difficult under the current human rights climate in Canada and has allowed for the ability to continue existing operations through a grandfather waiver that does not require random testing.

Furthermore, as provided in CN's supplemental submission of 13 March, 2002, there have been very few accidents involving Canadian train crews operating in the US. Data provided in that submission noted that the total of 3 reportable accidents in 5 years (none of which were either due to Transportation employee error or triggered the mandatory post-accident criteria), correspond to an accident ratio of 1.5 accidents per Million train miles. This is far below the industry average of approximately 4.0 and CN's own overall ratio of 2.1.

### **Regulatory Impact**

As part of its filing of February 7, 2002 on the original NPRM, CN provided considerable comments concerning the Regulatory Evaluation and associated economic impact evaluation prepared by FRA in support of the proposed rule.

Concerns raised by CN included the following:

- FRA suggested that some 170 Canadian-based train crew employees operate into the U.S. CN had identified approximately 140 Canadian-based train crew employees at CN alone that are in pools that regularly operate into the US. Adding those spareboard employees that can occasionally work in the US, the overall number for CN would be in the order of 400. In either case, the number used by FRA to develop the cost of the proposed rule would seem to be considerably underestimated.
- This section also suggested that Part 219 provides flexibility to allow railroads to exclude from the random testing pools employees who rarely perform covered service. Although it was unclear as to exactly what flexibility FRA is referring to, CN believes that, unless accompanied by similar Canadian legislation, the work involved in maintaining the pools and defending them in the context of Canadian Human Rights requirements will continue to be extremely difficult and costly.
- FRA suggested that "as a result of the requirements of the proposed rule, foreign railroads may decrease the number of train employees that operate in the United States to the minimum number required to perform the operations, under ideal conditions, and accept the risk of delay associated with not having some reserve engineers and other train crew members available." CN responded that this would not be a viable option. CN's customers demand on-time service and the railroad has been able to succeed by providing this level of service. CN's much-documented scheduled railroad and associated asset utilization philosophies are based on providing consistent performance. Clearly we cannot accept a risk of delay due to not having sufficient train crews cleared for operation in the U.S.
- The last paragraph in the "Employees" section stated that foreign-based dispatchers would not be affected by the extension of the rule due to the fact that they are not located in the U.S. This was felt to be inconsistent with the contents of the proposed rule, which indicated that, with the possible exception of existing "grandfathered" operations, foreign-based dispatchers would be subject to the expanded requirements. Similar conflicting statements were found in Section 9 of the document that stated in part "FRA is not aware of any FRFB dispatchers currently performing dispatching functions in the United States or of any specific plans to have FRFB employees perform dispatching functions in the United States in the future". CN indicated that these inconsistencies must be clarified and the economic analysis adjusted accordingly.
- CN also noted an apparent inconsistency in references to requirements for Pre-employment testing of train crews. In the section titled "Subpart F- Pre-employment Drug Tests", the document stated that the employees of CN and other railroads with existing operations into the US "would not have to be tested as the requirement applies prior to the first time an employee performs covered service." Further on in the section of the document containing specific estimated

costs, it was stated, "In the first year of the rule, the number of records kept would total approximately 140 percent of the number of covered train employees because pre-employment drug testing of all FRFB train employees would be required." Notwithstanding the fact that CN already conducts pre-employment testing for all train crew employees on both sides of the border, there would seem to be an inconsistency that needed to be clarified and properly reflected in the economic analysis.

- An inaccuracy with regards to pre-employment testing was noted in Section 11 of the document, which states in part, "Only one (Canadian) carrier is currently performing pre-employment drug testing." Although FRA did not indicate which carrier they were referring to, the statement was incorrect as CN was aware of at least two Canadian railroads (CN and CP) that conduct pre-employment testing.
- Also with respect to pre-employment testing, the document, in the section titled "Subpart F-Pre-employment Drug Tests" stated "This analysis further assumes that railroads would only test train employees once they are confirmed for a specific movement into the United States. Employees otherwise qualified to enter the United States, but with no specific job assignment would probably not be tested unless the railroad was very confident that such an assignment was imminent. FRA requests information regarding the accuracy of these assumptions." In its comments on this item, CN indicated that it would continue to pre-employment test all prospective train crew employees under company policy regardless of the likelihood of their operating into the U.S. In addition, specific FRA reported pre-employment testing would most likely have to be conducted when an employee enters into a pool designated for potential U.S. operation. To test only when an assignment "is imminent" is not practical and would lead to train delay.
- In the section of the document dealing with "Identification of Troubled Employees" FRA stated that employees who either refer themselves or are reported by co-workers will take a leave of absence to receive treatment, and once rehabilitated, will return to service on the recommendation of a SAP. It was noted in our comments that, for Canadian-based employees, the railroad's Chief Medical Officer ("CMO") would also have to approve any return to service.
- The same section of the document suggested that alternative policies for "Identification of Troubled Employees" are unlikely. As noted in our comments CN was of the view that the role of the CMO and the differences between the Railroad's peer reporting program and FRA requirements, although minor in nature, would result in the need for the filing of an alternate policy. It was indicated that this should be added to the economic analysis.
- CN also noted that a number of the cost components associated with the new requirements seemed to be significantly understated. For instance, in the section of the document titled "Subpart G- Random Alcohol and Drug Testing" FRA

estimated that the development and submission of a test program, as required under Part 219, would take only 1 hour. CN suggested that this would seem to be an extremely optimistic estimate and estimated that it would most likely take in the order of 8 - 24 hours to complete.

- The document also suggested that, based on FRA historical data for U.S. operations, it can be expected that 1% of FRFB train employees will exercise their right to be excused from a random drug or alcohol test. As noted in CN's comments it is our view this number will likely be higher than that for U.S.-based employees as the Canadian Human Rights Act provides some additional protection for such situations.
- The FRA analysis also did not account for a number of additional costs that would be incurred by railroads such as CN. Under Canadian law, drug or alcohol disorders are deemed to be disabilities. As such, a Canadian railroad must accommodate such employees to the extent possible. This will add additional cost to the railroads. This situation is different than for U.S. railroads where it is our understanding that the Americans with Disabilities Act does not have the same interpretation.
- CN noted that the combination of FRA regulations and Canadian Medical Rule requirements would add an additional cost for Canadian based crews which test positive for FRA required drug or alcohol tests. Under the Canadian requirements, the railroad's Chief Medical Officer would have the ultimate decision with regards to fitness for duty. Thus, in addition to the requirements associated with the SAP under FRA regulation, Canadian railroads would have an additional cost associated with CMO review of the fitness for duty of all employees who either test positive or are diagnosed as having a substance abuse disorder.
- With respect to costs associated with employees on Leave of Absence, CN noted that under its benefits program, CN may be required to pay sick leave benefits to such employees. CN would also be required to pay part of the rehabilitation costs. Both of these would be costs in addition to those estimated by FRA and must be added to the analysis.
- Of most significance with respect to the estimated costs to Canadian railroads was the complete omission of any mention of the costs that CN and other affected Canadian railroads will undoubtedly be forced to incur in defending humans rights challenges unless comparable Transport Canada regulations are enacted. Similarly it was pointed out that there was no reference to potential costs associated with train delays, operations changes or cross-border trade disruptions due to coordinated refusals on the part of the labor unions to submit to random testing. As previously noted these are, by far, the major concerns that CN has with the proposed rule.

- In its summary of costs contained in Section 8 of the document, FRA stated that the 20-year NPV cost is expected to total \$366,244 of which "\$84,945 would be spent by affected foreign railroads paying laboratories in the United States to maintain records and prepare summaries of FRFB train employee drug tests." CN noted that it was unclear as to why FRA was of the opinion that U.S.-based laboratories would have to conduct this work. Certainly for a railroad such as CN, there would be benefit in having a Canadian-based laboratory perform the work. Elsewhere in the document, in fact, FRA indicated that there are qualified Canadian labs.
- In Section 9 of the document, titled "Benefits", FRA provided data showing the number of accidents in which impairment due to drug or alcohol was listed as the primary or contributing cause. As indicated in our comments, the data in this table seemed to be inconsistent with that in a subsequent table displaying the results of post-accident test results. For instance, although there were 3 accidents in 1996 involving drugs or alcohol, there would only appear to have been 1 positive post-accident test. The reason for this inconsistency was unclear and CN asked that it be reviewed.

In light of the fact that a revised document economic impact document has not been prepared and issued for review, CN continues to have concerns that the economic justification for the rule is flawed. We therefore request that a revised economic analysis be prepared and provided for review prior to the issuance of any final rule.

#### Other Questions

CN also wishes to raise the following questions that it feels must be clarified prior to the publication of any final rule.

1) Extraterritorial Dispatching – Section V of the original NPRM stated in part that "FRA does not propose to apply any or all of Part 219 to the few employees permitted to conduct extraterritorial dispatching under the Interim Final Rule based on that service". In light of the fact that a final rule pertaining to Foreign-based dispatching requiring waivers for existing operations has been issued in the period since the NPRM, it is unclear as to how these employees and operations will be addressed in the proposed final rule. As noted in our comments on the original NPRM, CN believes that a requirement for random testing of employees who do not actually set foot in the US will be extremely contentious from both the standpoint of human rights and territorial jurisdiction under international law. CN seeks clarification on the application of the rule to foreign-based dispatchers

2) Handling of Foreign-based Signal Maintainers – Section V of the Introduction in the original NPRM also raised the issue of testing of foreign-based signal maintainers who may be required to perform work in the U.S. CN provided comments on this issue which agreed with FRA's view that these employees should remain exempt from the requirements of Section 219. CN seeks confirmation that they will be exempt in the final rule.



3) Expansion of Post-Accident testing – In Section VII of the Introduction to the original NPRM, FRA asked for comments as to whether post-accident testing should be expanded to include FRFB train employees who are involved in an otherwise qualifying event while in transit to or from the United States. CN provided comments suggesting that such an expansion will be very difficult to defend from the standpoint of international law and territorial jurisdiction. It added that CN was expanding its Canadian drug and alcohol testing policy to include post-accident testing using FRA criteria (which has since been carried out). It was our view that this adequately addresses this issue. CN seeks confirmation concerning the final decision with regards to this issue

4) Laboratories and testing equipment – In Section VIII of the Introduction to the original NPRM, FRA requested comments on a number of issues pertaining to laboratories and test equipment in Canada. CN provided comments which suggested that the most effective means of addressing these issues would be to certify one of more Canadian laboratories to be able to perform the required analysis. CN added that this would not be difficult in light of the high level of technical sophistication at many Canadian labs. CN seeks confirmation concerning the final decision with regards to these issues.

5) Requirement for SAPs – Under the proposed regulation, as noted in the original NPRM, employees who either refer themselves or are reported by co-workers will take a leave of absence to receive treatment, and once rehabilitated, will return to service on the recommendation of a SAP. It should be noted that Canada has few certified SAPs and no equivalent certifying process. Furthermore, as CN has previously stated, for Canadian-based employees, the railroad's Chief Medical Officer ("CMO") would also have to approve any return to service. As such, to avoid duplication and to address potential problems in finding FRA-certified SAPs in Canada, CN seeks confirmation as to whether FRA would accept a railway's CMO as equivalent to a SAP.

6) Definition of Border Zone – The suggested revisions contained in this Notice would exclude employees who perform service up to a specific distance (currently 10 route miles) into the U.S. It is unclear to how this would apply to situations such as where a train operates 6 miles into the US and 6 miles back for a total of 12 miles. Clarification is requested.

### Summary

In conclusion, CN continues to be of the view that the best means of addressing this issue is for FRA to continue to work with their Canadian counterparts in developing a common drug and alcohol regulation for railroad operations in the two countries. It is felt that such a measure would greatly eliminate the inevitable human rights/jurisdictional challenges and related economic impact on a railway such as CN associated with applying U.S regulation to Canadian-based employees while addressing the overall safety of operations and furthering the goals of NAFTA and the Canada/US Land Transportation Standards Subcommittee.

In the absence of Canadian legislation, we recognize the efforts made by FRA to attempt to address limited operations through the establishment of a border zone, but note that the 10 mile limit being proposed in this notice will still require CN to have to implement random testing pools at five locations.

This will clearly result in increased costs to CN associated with human right challenges and the need to comply with other aspects of the Canadian Human Rights legislation. It could also very potentially lead to train service problems affecting cross-border traffic and international trade. As such, the requirement would harm CN's competitive position compared to other railways and modes.

In recognition of the long-standing safety of CN's existing operations, the drug and alcohol programs already in place for CN's Canadian operations and to address these potentially harmful issues associated with FRA-imposed random testing without comparable Canadian legislation, CN respectfully requests that FRA consider adding the following to the final rule:

- Expanding the border zone limit to 25 miles
- Grandfathering existing operations
- Exempting "bridge" type operations which begin and end in the foreign country and involve the same crew throughout

In the absence of these measures to address current cross-border operations, CN notes that the current regulatory economic impact analysis prepared by FRA in support of the NPRM is flawed and requests that it be updated and reissued for review prior to the issuance of any final rule.

Sincerely,



Michael J. Barron Jr.

Counsel for Canadian National Railway Company